IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC 93172
	)	
GENE MORRIS JEFFREY,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF WARREN COUNTY, MISSOURI
TWELFTH JUDICIAL CIRCUIT
THE HONORABLE GAEL D. WOOD, JUDGE

APPELLANT'S REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant was convicted following a jury trial in the Circuit Court of Warren County, Missouri, of two counts of sexual misconduct involving a child under 15, class D felonies under Section 566.083, and two counts of attempting to commit the same offense. The Honorable Gael D. Wood sentenced him to a total of 130 days in jail and a total of $500 in fines. Notice of appeal was originally filed in the Eastern District Court of Appeals, but that Court transferred to the Missouri Supreme Court pre-opinion pursuant to Rule 83.01, as this appeal challenges the constitutionality of Section 566.083. This Court has original jurisdiction over challenges to the validity of a statute of Missouri. Article V, Section 3, Mo. Const. (as amended 1982).

STATEMENT OF FACTS

Appellant adopts and incorporates by reference the Statement of Facts from his original appeal.

ARGUMENT

I. (Constitutionality)

A. The Court's constitutional analysis in *Beine* is dicta, but it accurately reflects the law.

This Court's opinion in ***State v. Richard***, 298 S.W.3d 529, 531 (Mo. banc 2009) clearly states that "[t]he constitutional analysis in ***Beine*** was unnecessary to resolve the case and, as a result, is dicta."[1] However, the legislature did change the statute as a result of ***Beine***, and the constitutional issue is once again ripe for this Court to decide. The Court should use ***Beine*** as a guide because its analysis is sound, and it accurately applies the law.

Unlike the defendant in ***Richard***, Mr. Jeffrey argues not that ***Beine*** extends the right to free speech, but that it correctly applies the existing overbreadth doctrine to situations involving innocent nudity. ***Beine*** correctly states that "[w]hen a statute prohibits conduct a person has no right to engage in and conduct a person has a right to engage in, the statute is unconstitutionally overbroad." 162 S.W.3d at 486. The cases ***Beine*** cites in support of that statement remain good law. *See* ***City of St. Louis v. Burton***, 478 S.W.2d 320, 323 (Mo. 1972); ***Christian v. Kansas City***, 710 S.W.2d 11, 12–14 (Mo. App., W.D. 1986). ***Beine*** also correctly states that the overbreadth doctrine extends beyond purely First Amendment contexts. 162 S.W.3d at 487. The courts in ***Burton*** and ***Christian***

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[1] ***State v. Beine***, 162 S.W.3d 483 (Mo. banc 2005)

struck down loitering and solicitation ordinances, respectively, even though the defendants made no First Amendment arguments. 478 S.W.2d at 323; 710 S.W.2d at 12-14. Finally, ***Beine*** correctly states that a person may contest the constitutionality of a statute even if he was not engaging in constitutionally protected conduct. 162 S.W.3d at 487 (citing ***State v. Carpenter***, 736 S.W.2d 406 (Mo. banc 1987)).

B. The overbreadth doctrine applies to the right to privacy, and the right to privacy is a penumbra right, which incorporates aspects of other rights.

Respondent argues that Mr. Jeffrey cannot challenge the constitutionality of Section 566.083 on its face because this is not a First Amendment case, in that Mr. Jeffrey's conduct was not expressive. Mr. Jeffrey agrees that his conduct was not expressive.[2] However, the overbreadth doctrine still applies. First, the overbreadth doctrine applies to statutes that punish innocent conduct, including but not limited to conduct protected by the First Amendment. *See* ***Burton***, 478 S.W.2d at 323; ***Christian***, 710 S.W.2d at 12-14. In addition, the right to privacy exists through the penumbras of other rights, including those arising from the First Amendment. ***Griswold v. Connecticut***, 381 U.S. 479, 483-484 (1965).

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[2] In order for Mr. Jeffrey's conduct to have been expressive, it would have to be intentional. The jury was never required to make the determination of whether his conduct was intentional, which is why the statute punishes innocent conduct.

This Court in ***Beine*** did not couch its constitutional reasoning within a specific constitutional provision; nor did the Supreme Court of the United States when it struck down a vagrancy ordinance for vagueness and overbreadth. In ***Papachristou v. City of Jacksonville***, 405 U.S. 156, 164 (1972), that Court explained that even though the Constitution does not specifically mention them, the rights to wander and loiter are simply general freedoms that human beings have always enjoyed. The vagrancy ordinance in ***Papachristou*** raised "due process implications…in the sensitive First Amendment area." ***Id***. at 165-166. Here, the right to go nude *in public* is not such a general freedom, but the right to go about one's daily showering and dressing routine *in one's own home* without regard to what is going on outside the window certainly is.

The specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. ***Griswold***, 381 U.S. at 484. The right to privacy exists as a matter of due process, and it exists in the penumbras of other enumerated rights. ***Id***. at 481-484. In this way, Mr. Jeffrey's right to privacy in the personal intimacies of the home includes aspects of the First Amendment, even though his conduct was not expressive. The ideas of "nudity, without more" (***Osborne v. Ohio***, 495 U.S. 103, 112 (1990)) and the ability of passersby to avert their eyes (***Erznoznik v. City of Jacksonville***, 422 U.S. 205, 208 (1965)) should apply here because the situations are analogous and because the right to privacy exists in the penumbras of other enumerated rights.

C. Mr. Jeffrey's conduct comports with prior cases recognizing a right to privacy.

Respondent argues that Mr. Jeffrey's "asserted right to roam about his home while nude" does not comport with prior decisions recognizing a right to privacy because it is not a "personal right[] that can be deemed 'fundamental' or 'implicit in the concept or ordered liberty,'" as stated in ***Paris Adult Theatre I v. Slaton***, 413 U.S. 49, 65 (1973) (citations omitted). Res. Br. at 27, 29.

First, it should be noted that Mr. Jeffrey argues for more than a "right to roam about his home while nude." Res. Br. at 27. In ***Lawrence v. Texas***, 539 U.S. 558, 566-567 (2003), the Supreme Court of the United States scolded itself for its earlier statement that "[t]he issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy[.]" (quoting ***Bowers v. Hardwick***, 478 U.S. 186, 190 (1986). "That statement," the Court admitted in ***Lawrence***, "discloses the Court's own failure to appreciate the extent of the liberty at stake." 539 U.S. at 567. In the same way, the liberty at stake here is more than Mr. Jeffrey's "right to roam about his home while nude." The issue is whether adults must curb their innocent, natural behavior in private areas such as their own homes out of the fear that a child will see; and if a child does see, that the adult will forever be labeled a convicted felon and a sex offender for engaging in "sexual misconduct involving a child under 15."

Second, the right to non-sexual nudity in one's home and other private locations comports with prior decisions recognizing a right to privacy, in that it is a personal right that can be deemed implicit in the concept of ordered liberty. Mr. Jeffrey does not argue protection for nudists and nudism, but for the nudity that is naturally a part of bathing and changing clothes. Such conduct comports with cases where courts have found protection, and it is distinguishable from cases where no protection exists.

Respondent lists seven instances where the right to privacy exists: consensual homosexual conduct, abortion, single persons' contraception, married persons' contraception, possession of obscene materials in the home, interracial marriage, and inmate procreation. Res. Br. at 29-30. The ability to bathe and get dressed is as fundamental, if not more, than each of the other types of conduct that courts have protected, irrespective of whether children are present. This Court in ***Beine*** noted that "a person's right to use the public restrooms is about as fundamental a right as one can imagine." 162 S.W.3d at 487. The presence of children makes the statement no less true; nor does the fact that it was dicta. The same applies here.

On the other hand, Respondent lists several instances in which courts have found no protection. Res. Br. at 30-31 (citing ***Paris Adult Theatre I***, 413 U.S. at 66, 69 (no right to watch obscene movies in places of public accommodation); ***Caesar's Health Club v. St. Louis County***, 565 S.W.2d 783, 787-788 (Mo. App. 1978) (no right to engage of acts of massaging for hire involving sexual touching);

Osborne, 495 U.S. at 111 (no right to possess child pornography)). Each of these cases is distinguishable because it involves either obscenity or a sexual element. Obscenity and child pornography, unlike "nudity, without more", receive no constitutional protection. ***New York v. Ferber***, 458 U.S. 747, 764 (1982); ***Osborne***, 495 U.S. at 112. Similarly, the conduct in ***Caesar's Health Club*** involved sexual touching. 565 S.W.2d at 785. On the contrary, the question in Mr. Jeffrey's case is whether nudity is inherently sexual such that nudity without more constitutes sexual misconduct.

Finally, Respondent misunderstands Mr. Jeffrey's argument as relying solely on the home for protection. Respondent lists three cases in which courts have upheld convictions for acts that occurred within the defendant's home. Res. Br. at 28. *See* ***State v. Jeffries***, 272 S.W.3d 883 (Mo. App., S.D. 2008); ***State v. Caston***, 996 So.2d 480 (La. App. 2d Cir. 2008); ***State v. Hackett***, 323 N.J. Super. 460, 467 (1999). However, none of those three defendants made constitutional arguments. The crux of Mr. Jeffrey's argument is not that he was in his own home, but that Section 566.083.1 punishes innocent conduct. That he was in his own home distinguishes his case from instances of public nudity, which receive no constitutional protection. The two non-Missouri cases, punishing "indecent behavior with a juvenile" and "lewdness" respectively, are distinguishable because both require the nudity to have a sexual element. LSA-R.S. 14:81; N.J.S.A. 2C:14–4b(1). In Missouri, Sections 566.083.1 and 566.093.1 would be constitutional if they required intent or if they required that the nudity be sexual.

Respondent notes that "[b]eing in a state of nudity is not an inherently expressive condition" (internal quotations omitted). Res. Br. at 20 (quoting ***City of Erie v. Pap's A.M.***, 529 U.S. 277, 289 (2000). Similarly, being in a state of nudity is not inherently sexual. The turning point is when the exposure is intentional and when it is done for the purpose of arousing or gratifying someone's sexual desires. Even this Court's definition recognizes that the definition of "affront" is "a *deliberately* offensive act or utterance" (emphasis added). ***State v. Moore***, 90 S.W.3d 64, 67-69 (Mo. banc 2002). However, Section 566.083 does not require that the exposure be deliberate. For this reason, the statute unconstitutionally prohibits innocent conduct.

II. (Sufficiency)

In his original brief, Mr. Jeffrey argues that Section 566.083.1(1) is unconstitutional and that the evidence presented at trial was insufficient to convict him because the State failed to prove two elements under Section 566.083.1(1): that Mr. Jeffrey had knowledge that children could see him; and that Mr. Jeffrey had actual knowledge that his conduct would cause affront or alarm. These arguments are in the alternative. Mr. Jeffrey does not concede the sufficiency of the evidence through his constitutional challenge.

Nor does Mr. Jeffrey concede the knowledge elements as to the November counts. It is true that there was less evidence of a mental state as to the earlier counts, given that no one had told Mr. Jeffrey that he was visible from the sidewalk, but even that additional evidence is not enough to establish the dual knowledge elements as to any of the four counts.

However, it could appear that the State met its burden as to those elements if the Court incorrectly analyzes the elements of Section 566.083.1(1), as did the trial court here and the court in ***State v. Brown***, 360 S.W.3d 919, 921-922 (Mo. App., W.D. 2012). In both instances, the courts held the defendants to something other than knowledge, which is contrary to the language of the statute.

In Mr. Jeffrey's case, the trial court used a single reckless requirement, rather than two specific knowledge requirements. In overruling Mr. Jeffrey's motion for judgment of acquittal, the trial court based its ruling on whether Mr. Jeffrey would have reasonably foreseen that people could see him from outside,

explaining that people can get away with more nudity in rural areas than in urban areas (Tr. 241-242). That is not the same test as whether he had knowledge that he was exposing himself to children; and in addition, that he had knowledge that his nudity would cause the children affront or alarm.

In ***Brown***, the court mixed and confused the two distinct knowledge elements, using the language "under circumstances in which he or she knows that his or her conduct is likely" to modify the first knowledge element rather than the second. 360 S.W.3d at 922-923. In this way, the court erroneously held that the first knowledge element is satisfied when *it is likely* that someone could see the defendant, rather than requiring the State to prove that the defendant actually exposed himself to a person as stated in the statute. *See* Section 566.093.1.

Furthermore, the facts in ***Brown*** are distinguishable. Brown was masturbating outside on a well-lit residential street. 360 S.W.3d at 923. Mr. Jeffrey was not in a public area; rather, he was in his own house. Nor was he touching himself; he was simply standing near a window. The court in ***Brown*** held that the defendant "is presumed to know that certain behavior is criminal," ***Id***., thus satisfying the second knowledge element as stated in ***State v. Moore***, 90 S.W.3d 64, 68 (Mo. banc 2002). Similarly, in ***State v. Jeffries***, 272 S.W.3d 883, 886 (Mo. App., S.D. 2008), the defendant actually acknowledged that the child could see his penis and asked her if he was going to tell anyone. That statement entitles a court to presume that he knew his conduct was wrong. Here, the State

presented no evidence that would entitle the Court to presume that Mr. Jeffrey knew his behavior was criminal.

CONCLUSION

For these reasons, and for the reasons stated in his original brief, appellant respectfully requests that this Court reverse his convictions.

Respectfully submitted,

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Tyler Coyle, a third year law student at the University of Missouri – Columbia, assisted in the preparation of this brief.

Certificate of Compliance and Service

I, Ellen H. Flottman, hereby certify to the following. The attached reply brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word in Times New Roman, size 13 point font. Excluding the cover page, the signature block, and this certificate of compliance and service, the brief contains 2,645 words, which does not exceed the 7,750 words allowed for a reply brief.

On this 18th day of April, 2013, an electronic copy of Appellant's Reply Brief was placed for delivery through the Missouri e-Filing System to Jessica Meredith, Assistant Attorney General, at Jessica.Meredith@ago.mo.gov.

/s/ Ellen H. Flottman

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